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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT SEATTLE

8 KEVIN JOSEPH FADER,

9 Plaintiff,

10 v.

11 DRISS BERRADA, M.D.,

Defendant.

C21-5264 TSZ

ORDER

12 THIS MATTER comes before the Court on the Report and Recommendation
13 (“R&R”) of the Honorable Theresa L. Fricke, United States Magistrate Judge, docket
14 no. 23, to which no objection has been filed. Plaintiff pro se Kevin Joseph Fader, who is
15 currently incarcerated at Coyote Ridge Corrections Center in Connell, Washington,
16 brings this action against Driss Berrada, M.D., for allegedly poor medical treatment he
17 received at Grays Harbor Community Hospital, also known as Harbor Regional Health
18 Community Hospital, located at 915 Anderson Drive in Aberdeen, Washington, which is
19 the address listed for Dr. Berrada in the operative pleading. See Compl. (docket no. 7).
20 The complaint does not indicate the legal theory or theories under which plaintiff sues
21 Dr. Berrada, but the two most likely candidates are (i) violation of 42 U.S.C. § 1983; and
22 (ii) negligence.
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1 Dr. Berrada has filed a motion, docket no. 12, to dismiss any § 1983 claim and any
2 state-law claim with prejudice. The R&R assumes that plaintiff is pursuing a claim
3 under § 1983, and recommends dismissal, without prejudice and with leave to amend, for
4 failure to adequately state a claim of deliberate indifference under either the Eighth or
5 Fourteenth Amendment. The R&R does not, however, analyze whether Dr. Berrada was
6 acting under color of state law when the medical services at issue were allegedly
7 provided to plaintiff. *See Clewis v. Cal. Prison Health Care Servs.*, No. 2:09-cv-2120,
8 2013 WL 2482521, at *4–6 (E.D. Cal. June 10, 2013) (concluding that “a health care
9 provider not contracted to the state[, which] has a preexisting commitment to serve all
10 persons who present themselves for emergency treatment” is not a state actor for
11 purposes of § 1983 with respect to the treatment of inmates). The record contains no
12 factual allegations or evidence from which the Court can determine whether Dr. Berrada
13 qualifies as a state actor. To the extent he does not, plaintiff cannot pursue a claim under
14 § 1983. To the extent he does, the Court agrees with the R&R that the complaint does
15 not sufficiently plead facts plausibly showing the requisite deliberate indifference, but
16 that amendment is not futile.

17 With respect to any state law claims, the R&R does not address Dr. Berrada’s
18 argument that plaintiff failed to provide the pre-litigation tort-claim notice required by
19 RCW 4.96.020. The tort-claim-notice issue raised by Dr. Berrada is a reason, in addition
20 to those set forth in the R&R, for denying plaintiff’s motion, docket no. 21, to stay these
21 proceedings until January 2023, after plaintiff is released from prison. If plaintiff must
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1 comply with RCW 4.96.020, a stay might result in plaintiff failing to do so within the
2 three-year limitations period applicable to negligence claims.

3 The R&R also does not consider Dr. Berrada's suggestion that, if the § 1983
4 claim does not survive, the Court should decline to exercise supplemental jurisdiction
5 over any state law claims. Whether the Court would have only supplemental, as opposed
6 to diversity, jurisdiction over any state law claims is unclear. The record is silent
7 concerning Dr. Berrada's current place of residence, as well as the amount in
8 controversy.

9 **Conclusion**

10 For the foregoing reasons, the Court ORDERS:

11 (1) The Report and Recommendation, docket no. 23, is ADOPTED as follows:

12 (a) Plaintiff's motion to stay, docket no. 21, is DENIED;

13 (b) Defendant's motion to dismiss, docket no. 12, is GRANTED in part
14 (as to dismissal of any § 1983 claim), DENIED in part (as to such dismissal being
15 with prejudice), and DEFERRED in part (as to dismissal of any state-law claims);

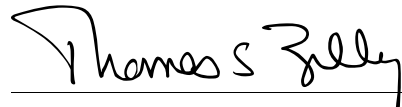
16 (c) Plaintiff's complaint, docket no. 7, is DISMISSED in part (as to any
17 § 1983 claim) without prejudice and with leave to amend by a deadline to be set
18 by Magistrate Judge Fricke; and

19 (d) The deferred portion of defendant's motion to dismiss and this
20 matter are REFERRED back to Magistrate Judge Fricke for further proceedings.

21 (2) The Clerk is directed to send a copy of this Order to all counsel of record,
22 to plaintiff pro se, and to Magistrate Judge Fricke.
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1 IT IS SO ORDERED.

2 Dated this 16th day of December, 2021.

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5 Thomas S. Zilly
6 United States District Judge
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